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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-73

THE KANSAS CITY STAR COMPANY,
FLAMBEAU PAPER COMPANY DIVISION,
Petitioner,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF OF RESPONDENT, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported as *Kansas City Star Co. v. ILHR Department* (1973), 60 Wis. 2d 591, 211 N.W. 2d 488 (Pet. App. 50-64). Its opinion denying a motion for rehearing is reported at 62 Wis. 2d 783, 217 N.W. 2d 66 (Pet. App. 65-72).

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §1257(3) and §2101(c). This Court, however, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court herein because that court decided no federal question.

QUESTION PRESENTED

No federal question is properly presented by the petition herein. The "Question Presented For Review" as set forth in the petition was neither properly presented to nor decided by the Wisconsin Supreme Court, which decided only questions of state law.

STATEMENT OF THE CASE

The petitioner, hereinafter referred to as the employer, operates a paper mill in Park Falls, Wisconsin. It employed approximately 380 production workers at its mill. Most of these employes were members of one of two labor unions and such employes are respondents herein. The two unions had bargained jointly with the employer for over 30 years and on August 1, 1969, they had a two-year labor contract. This contract was in effect from August 1, 1969, through July 31, 1971, "and from year to year thereafter, unless terminated" in accordance with other contract provisions.

Beginning in May, 1971, there was a complicated series of events involving labor and management, which events are described in detail in the opinion of the Wisconsin Supreme Court (Pet. App. 50-55). These events culminated in September, 1971, in the closing of the mill and the layoff of the employes.

Thereafter the employes applied to the respondent Wisconsin Department of Industry, Labor and Human Relations, hereinafter called the department, for state unemployment compensation benefits. The employer contested the eligibility of the employes for such benefits on the ground that they were ineligible for them under the provisions of sec. 108.04(10), Wis. Stats., which provides:

> "LABOR DISPUTE. An employe who has left (or partially or totally lost) his employment with an employing unit because of a strike or other *bona fide labor dispute* shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other *bona fide labor dispute is in active progress in the establishment* in which he is or was employed." (Emphasis added.)

After a contested administrative hearing, the department found that the employes were eligible for state unemployment compensation benefits, since, although they had lost their employment, they had not lost such employment because of a bona fide labor dispute in active progress in the establishment within the meaning of sec. 108.04(10), Wis. Stats. (Pet. App. 11.)

The employer sought judicial review of this decision in the Circuit Court of Dane County, Wisconsin. That court reversed the decision of the department on the basis of its interpretation of sec. 108.04(10), Wis. Stats. (Pet. App. 50.) The Circuit Court decided only questions of state law.

The department and the employes, then, appealed from the judgment of the Circuit Court to the Wisconsin Supreme Court. The dispositive issues in the Wisconsin Supreme Court are described in the opinion of that court as:

"1. What is the meaning of a bona fide labor dispute as set forth in sec. 108.04(10), Stats.?

"2. Does the evidence support the findings by the Department that the employees did not lose their employment because of a bona fide labor dispute in active progress in the establishment in which they were employed?" (Pet. App. 59.)

The Wisconsin Supreme Court defined a "bona fide labor dispute" within the meaning of sec. 108.04(10), Wis. Stats., and determined that the evidence supported the finding of the department that the employes did not lose their employment because of a bona fide labor dispute in active progress in the establishment in which they were employed (Pet. App. 59-63). It, therefore, unanimously reversed the judgment of the lower court (Pet. App. 63). Subsequently it denied the employer's motion for rehearing, although three members of the court dissented to such denial (Pet. App. 65-72).

The employer has now petitioned this Court for a writ of certiorari to review the judgment of the Wisconsin Supreme Court. This Court, however, has no jurisdiction to conduct such a review and, therefore, the petition must be denied.

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court.

A. No federal question was decided by the Wisconsin Supreme Court.

As revealed by the opinions of the Wisconsin Supreme Court, and acknowledged by the employer (Pet. 9), the Wisconsin Supreme Court herein did not decide any federal

question (Pet. App. 50-72). It exclusively defined a "bona fide labor dispute" within the meaning of sec. 108.04(10), Wis. Stats., and determined that the evidence presented at the administrative hearing supported the department's determination that the employes were not ineligible for state unemployment compensation benefits because of the content of that subsection of the Wisconsin Statutes.

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257(3). Such jurisdiction exists *only* when a federal question has been properly presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52.***' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the

sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with *no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S. Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L. Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S. Ct. 163, 24 L. Ed. 2d 148.

The employer's "Question Presented For Review" (Pet. 5) is a mere argumentive question based on its evaluation of

the *result* of the decision of the Wisconsin Supreme Court on questions of state law. It is not a question which was either presented to or decided by that court. The assertion in the question that Wisconsin provides "economic support of union members who are unemployed because of a labor dispute" (Pet. 5) is untrue. Section 108.04(10), Wis. Stats., quoted *supra*, so demonstrates.

Even if the Wisconsin Supreme Court erroneously interpreted sec. 108.04(10), Wis. Stats., no jurisdiction exists in this Court to review such interpretation of the state law. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, wherein he wrote:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that *this court's power to review decisions of state courts is limited to their decisions on federal questions;* and that *the mere fact that a state court has rendered an erroneous decision on a question of state law,* or has overruled principles or doctrines established by previous decisions on which a party relied, *does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*" (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reason the petition for certiorari should be denied.

Respectfully submitted,

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